SUPREME COURT, U.S.
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No. 10-469

In The

Supreme Court of the United States

JOHN K. BALDWIN,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE NORTHERN MARIANA ISLANDS,
Respondent.

UNITED STATES OF AMERICA,
Real Party in Interest.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

I. The Government Effectively Concedes That This Case Implicates A Long-Standing and Important Split in the Federal Circuits.

In an attempt to reframe the issue at hand to obscure the circuit split raised by Petitioner, the Government contends that the issue presented here is "whether a district court *may* deny an untimely jury demand that is attributable to the moving party's oversight."[1] It is not. Rather, the issue is what standard should be used to determine if an untimely request for a jury trial should be granted.

In this regard, the Government concedes that the Ninth Circuit has "gone further than other courts of appeals in explicitly holding that '[a]n untimely request for a jury trial *must* by denied unless some cause beyond mere inadvertence is shown.'"[2] In fact, at least thirteen federal courts, beginning in 1972 and continuing up through this year, have identified a multi-circuit split regarding the standard by which a district court should exercise its discretion under Rule 39(b).[3]

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[1] Government's Brief in Opp. ("Opp.") 10 (emphasis in original).

[2] *Id.* (quoting with emphasis added, *Pacific Fisheries Corp v. H.I.H. Cas. & Gen. Ins., Ltd.*, 239 F.3d 1000, 1002 (9th Cir. 2001)).

[3] Pet. 7-9 & n.6.

Under the standard employed in every circuit other than the Ninth, Petitioner's jury demand would almost certainly have been permitted.[4] A district court in the Ninth Circuit, however, has no discretion to excuse an inadvertent jury waiver.[5] Indeed, the Government specifically conceded that the reason the "district court declined to grant petitioner relief . . . [was] the decision of the court of appeals in *Pacific Fisheries Corp.*," which sets forth the Ninth Circuit's uniquely rigid view.[6]

The Government also implicitly concedes the split between the Ninth Circuit (as well as all other circuits), and the Second Circuit. The Second Circuit reads Rule 39(b) in tandem with Rule 6(b), which allows any untimely filing in federal court to be excused if based on "excusable neglect."[7] Accordingly, an untimely jury demand in the Second Circuit may be excused even if based entirely on "neglect" – in direct contradiction to the rule in the Ninth Circuit.[8] Significantly, the Second Circuit's ruling is a direct descendant of this Court's holding in *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380,

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[4] Pet. 17-23.

[5] *Id.*

[6] Opp. 5.

[7] *See* Pet. 15-17 (*discussing Raymond v. IBM Corp.*, 148 F.3d 63 (2d Cir. 1998)). The United States does not dispute the conflict between *Raymond* and the rule in the Ninth Circuit.

[8] *Id.*

387 & n.3 (1993), which rejected the inflexible rule used in several circuits that required something more than inadvertence to excuse an untimely filing under Rule 6(b). If untimely filings of lesser importance than a jury demand can be permitted when mitigating factors favor the extension of such grace,[9] then surely the determination of when to allow an untimely jury demand should be afforded the same or greater solicitude.

There is no factual dispute regarding the specific posture of this case. Petitioner made a formal jury demand which was untimely by only two days.[10] There has been no contention that this delay caused prejudice. Moreover, the formal demand was a follow-up to a jury demand contained in Petitioner's draft case management order, which the Government admits having received *within the deadline for service of a jury demand*.[11] Even if not credited as a sufficiently formal jury demand, the Government's actual receipt of Petitioner's less formal jury demand, via email service (to which it specifically consented), is a factor a district court in any other circuit could have considered.

The Government points to cases in the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth,

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[9] *Id.* (listing factors to be considered).

[10] Pet. 5; Opp. 3.

[11] Opp. 2. Moreover, the Government recognizes that Petitioner prepaid $5 million in taxes to avail himself of a jury trial in district court. Opp. 6.

Eleventh, and DC circuits for the proposition that there is no meaningful circuit split.[12] While the cited cases do generally find no abuse of discretion by lower courts declining to grant Rule 39(b) motions, in each of those cases there were factors militating against granting a Rule 39(b) motion that are not present here. These factors include (1) length of delay of: six months,[13] more than a year,[14] two years,[15] over two years,[16] and as late as two weeks before trial;[17] (2) facts so technical that the court doubted that a

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[12] Opp. 10-12.

[13] *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 632 (6th Cir. 2008).

[14] *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir. 1983); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 356-57 (2d Cir. 2007); *BCCI Holdings (Lux.) S.A. v. Khalil*, 214 F.3d 168, 173 (D.C. Cir. 2000) (hereinafter "*BCCI*"). *Westchester Day* highlights another schism in the case law. There, when Rule 6(b) and *Raymond v. IBM Corp.* were apparently not raised, the court relied upon the holding in *Noonan v. Cunard S.S. Co. Ltd.*, 375 F.2d 69, 70 (2d Cir. 1967) under which, as in the Ninth Circuit, a district court has no discretion to grant an untimely jury demand if the reason for delay was inadvertence.

[15] *Nissan Motor Corp. v. Burciaga*, 982 F.2d 408, 409 (10th Cir. 1992).

[16] *Gen. Tire & Rubber Co. v. Watkins*, 331 F.2d 192, 197-98 (4th Cir. 1964)

[17] *SEC v. Infinity Group Co.*, 212 F.3d 180, 195-96 (3d Cir. 2000).

jury could even "comprehend the complex issues" much less "reach a correct decision;"[18] (3) deliberate tactical delay;[19] (4) completion of discovery and motion deadlines;[20] (5) reliance by the Court and/or the party opposing the motion on having prepared for a bench trial;[21] (6) prejudice to party opposing the motion,[22] and (7) complete failure to make a written jury demand.[23]

Although the ten circuit courts cited by the Government may *allow* district courts to deny a Rule 39(b) motion based in whole or in part on the fact that a jury demand was inadvertently untimely, six of these ten circuit courts *require* district courts to take into consideration other factors.[24] In those circuits, the district courts are either required to grant an untimely demand for a jury "in the absence of compelling reasons to the contrary," or else are required to perform a balancing-test which weighs factors such lack of prejudice to the opposing party,

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[18] *Gen. Tire & Rubber Co.*, 331 F.2d at 197-98.

[19] *Littlefield v. Ft. Dodge Messenger*, 614 F.2d 581, 585 (8th Cir. 1980).

[20] *BCCI*, 214 F.3d at 173.

[21] *Parrott*, 707 F.2d at 1267; *BCCI*, 214 F.3d at 173.

[22] *Andrews*, 544 F.3d at 632; *Infinity Group Co., 213 F.3d at 196*; *BCCI*, 214 F.3d at 173.

[23] *Littlefield*, 614 F.2d at 585.

[24] Pet. 17-20 (discussing standard in the Third, Fourth, Seventh, Eighth, Eleventh and D.C. Circuits).

prejudice to the movant, good faith of the movant, lack of prejudice to the schedule of the court, and the appropriateness of the issues involved for a jury.[25]

The remaining four circuits cited by the Government vest complete discretion in their district courts, enabling them to consider the balancing factors considered in the other circuits.[26] Only in the Ninth Circuit are district courts completely prohibited from exercising discretion to grant an inadvertently untimely jury demand.

II. The Government's Argument that Man-damus Is Not Warranted to Safeguard Petitioner's Right to a Jury Trial Ignores This Court's Holdings in *Dairy Queen* and *Beacon Theatres*.

The Government also argues that the improper denial of Petitioner's right to a jury trial does not need to be corrected on mandamus, because it can be addressed on direct appeal after trial.[27] However, this argument ignores the holdings in *Beacon Theatres, Inc. v. Westover*[28] and *Dairy Queen, Inc. v. Wood*.[29] This Court held in both cases that a court of appeals must grant mandamus to protect the right to a jury

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[25] *Id.*

[26] Pet. 20-22 (discussing standard in First, Fifth, Sixth and Tenth Circuits).

[27] Opp. 6-10.

[28] 359 U.S. 500, 511 (1959).

[29] 369 U.S. 469, 472 (1960).

trial any time "it has been improperly denied,"[30] emphasizing that it is "the *responsibility* of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to a trial by jury."[31]

The result of these holdings has been to grant parties in federal court the right to petition for mandamus, whenever their right to be heard by a jury is at stake. As the Sixth Circuit explained in *National Union*:

> When the [District] Court denied trial by jury, the appellants could have filed an action in mandamus in this Court . . . Had they done [so], they might have obtained the relief they are now seeking and thus they would have avoided the ten days' [bench] trial before the Court.[32]

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[30] *Beacon Theatres*, 359 U.S. at 511.

[31] *Dairy Queen*, 369 U.S. at 472 (emphasis added). As the Government notes (Opp. 6), Petitioner's right to a jury trial is statutory, not constitutional. Rule 38(a) states that the right to a jury trial is to be afforded the same protection *regardless* of whether it is granted directly by the Constitution or by statute.

[32] *National Union Electric Corp. v. Wilson*, 434 F.2d 986, 988 (6th Cir. 1970); *accord In re Jensen*, 946 F.2d 369, 371 (5th Cir. 1991) ("[A] writ of mandamus is an appropriate remedy to protect the valued right of trial by jury and to avoid costly, multiple trials."); *In re Hooker Invs., Inc.*, 937 F.2d 833, 837 (2d Cir. 1991) ("[W]hen an otherwise unappealable order denies a claimed right to a

The Government's reliance on *Cheney v. United States District Court,* 542 U.S. 367 (2004)[33] is misplaced, because *Cheney* did not involve review of the denial of a right to a jury trial. *Beacon Theatres* and *Dairy Queen* establish a different standard when a jury demand is at stake.[34] Indeed, while mandamus ordinarily requires a petitioner to demonstrate that he is clearly entitled to relief, and would be irreparably harmed in its absence, in the context of a jury demand, mandamus is warranted even where the petitioner's right to a jury trial is "debatable,"[35] and even when "irreparable harm could easily have been found wanting."[36]

As explained by the Tenth and D.C. Circuits:

> [E]ven on an application for an extraordinary writ for pre-trial relief the Supreme Court expects the courts of appeals to make a determination whether or not there is a right of trial by jury, regardless of whether the

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jury trial, immediate review may be obtained by way of a petition for mandamus.").

[33] *See* Opp. 6-10.

[34] *Beacon Theatres*, 359 U.S. at 511; *Dairy Queen*, 39 U.S. at 472-473; *accord In re Lockheed Martin Corp.*,503 F.3d 351, 353-54 (4th Cir. 2007); *In re Rhone-Poulenc Roher Inc.*, 51 F3.d 1293. 1303-04 (7th Cir. 1995).

[35] *In re Union Leader Corp.*, 292 F.2d 381, 384 (1st Cir. 1961) (citations omitted).

[36] *In re Sandahl*, 980 F.2d 1118, 1120 (7th Cir. 1992) (citations omitted).

> question is a close or complicated one . . . the Court would not welcome a doctrine whereby a party's constitutional right to jury trial was trammeled in fact because a court of appeals determined that the issue was doubtful. . . .[37]

The right to obtain interlocutory relief through mandamus – whenever a jury trial has been improperly denied – is "firmly settled."[38] As explained by the Third Circuit in *Allegheny,* the courts of appeals are generally – and understandably – reluctant to intervene in district court proceedings through the writ of mandamus, but this Court's holdings have made review of the denial of a jury trial into an exception to this general rule.[39]

The Government ignores this long stream of precedent and attempts to distinguish *Beacon Theatres* and *Dairy Queen,* arguing that these two holdings should not apply outside of their specific

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[37] *Bruce v. Bohanon,* 436 F.2d 733, 735 (10th Cir. 1970) (quotation omitted).

[38] *In re Vorpahl,* 695 F.2d 318, 319 (8th Cir. 1982); *accord Lee Pharms. v. Mishler,* 526 F.2d 1115, 1116 (2d Cir. 1975).

[39] *Allegheny Int'l, Inc. v. Allegheny Ludlum Steel Corp.,* 920 F.2d 1127, 1133-34 (3d Cir. 1990) (Notwithstanding "courts' general reluctance to issue writs of mandamus . . . *Dairy Queen* and *Beacon Theatres* have begotten an impressive progeny.") *(citing Higgins v. Boeing Co.,* 526 F.2d 1004, 1006 (2d Cir. 1975); *Eldredge v. Gourley,* 505 F.2d 769, 770 (3d Cir. 1974); *Mondor,* 910 F.2d at 586; *In re Vorpahl,* 695 F.2d at 319; *In re Zweibon,* 565 F.2d 742, 746 (D.C. Cir. (1977)).

procedural context – the loss of a jury trial by having the court try equitable claims first and establishing facts that would otherwise be found by a jury.[40] As if in contrast, the Government states "[i]n *this* case there is no danger that Petitioner's right to a jury trial will be lost if he is required to raise the issue of the district court's denial of his jury demand on direct appeal[.]"[41] However, the same could have been said of the jury right at issue in *Dairy Queen* and *Beacon Theatres*.[42] Petitioner has not found, and the Government has not cited, a *single* case suggesting that this Court's holdings should not apply in this particular context.[43] In fact, this Court has

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[40] Opp. 9 n.4.

[41] Opp. 9 n.4 (emphasis added).

[42] *In re Rhone-Poulenc Roher Inc.*, 51 F3.d 1293, 1303-04 (7th Cir. 1995)(noting that fact that in *Beacons Theatres* a new jury trial could have been ordered on direct appeal did not prevent the Court from granting the writ because when mandamus used to protect right to jury trial, strict compliance with usual standards for obtaining writ excused).

[43] The Government challenges Petitioner to cite a single case in which mandamus was granted to reverse a district court's decision to strike an untimely jury demand. Opp. 9. As set forth herein, there are many cases granting mandamus to remedy a wrongfully denied jury trial, and one such case specifically dealing with an allegedly untimely jury demand is *Higgins*, 526 F.2d at 1006 (after untimely jury demand was stricken by district court, court of appeals granted mandamus and reversed, holding that "[o]ur power to preserve the important right to a trial by jury by mandamus is clear.").

reaffirmed its holding in *Beacon Theatres* and observed that it applies in any procedural context in which the right to a jury trial has been denied.[44]

There is no reason for the Court to revisit its holdings on the appropriateness of mandamus where a jury trial has been erroneously denied. Its previous holdings on this issue have been repeatedly applied by the courts of appeals for half a century. Accordingly, this Court should grant certiorari to address the deep circuit split identified in the Petition and, if it is found that Petitioner's right to a jury trial was wrongfully denied, reverse the Ninth Circuit's decision to deny mandamus.[45]

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[44] *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 288 n.13 (1988).

[45] The rulings in *Beacon Theaters* and *Dairy Queen* are a necessary corollary of the consequences of the wrongful refusal to afford a party a jury trial, the harm from which is not correctable on direct appeal. Among other irremediable harms, evidentiary rulings in a bench trial are likely to be very different than in a jury trial, but once evidence is in the record of the bench trial, the likelihood of its use in a subsequent jury trial increases. Settlement considerations are also affected by whether a case is to be tried to the bench or a jury.

III. The District Court's Determination That A Draft Case Management Plan Containing A Jury Demand Is Not a Document Capable Of Being Served Is So Obviously Erroneous as to Give Rise to A Clear and Undisputable Right to Mandamus Relief.

In even the last ten years, the means of service and filing have radically changed in the federal courts.[46] The vast majority of local rules require lawyers to register for e-filing and consent to email service at specified email addresses, as did the Government's lawyers here,[47] making insistence on "more formal" service anachronistic.

This Court should take the opportunity to disabuse courts of any lingering prejudice against email service, particularly in cases like this one, in which there is no dispute that the jury demand at issue was actually received and read by lawyers who had specifically consented to such service. To allow the Government to thwart the Petitioner's jury right by questioning the "formality" of Petitioner's emailed jury demand, contained in a draft case management order – a document routinely served and filed – would be to raise form over substance.[48]

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[46] *See* Fed. R. Civ. P. 5(b)(2)(E) (authorizing electronic service).

[47] Pet. 27 n.50; App. 41.

[48] The Government has presented no authority to counter the common-sense rulings of the cases cited by Petitioner (Pet. 26 n.47) to the effect that a draft case management order asserting a right to a jury trial is a

Ironically, it is the Ninth Circuit that best articulates the need for common sense and flexibility in this regard. Because the "right of jury trial is fundamental," courts are required to "indulge every reasonable presumption against waiver."[49] All that is required is that:

> the jury demand be sufficiently clear to alert a careful reader that a jury trial is requested on an issue. This approach ***allows a great deal of flexibility in how the request is made***, and so comports with [this Court's] presumption against waiver, while still recognizing that the purpose of RULE 38's demand requirement is to inform the court and counsel well in advance of trial as to the trial method desired.[50]

Accordingly, it is "clear and undisputable" that Petitioner is being deprived of a jury trial to which he is entitled, making mandamus relief both necessary and appropriate.

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cognizable jury demand when served. Opp. 13.

[49] *Lutz v. Glendale Union High Sch.* 403 F.3d 1061, 1064 (9th Cir. 2005) (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)).

[50] *Lutz*, 403 F.3d at 1064-65 (quotation omitted and emphasis added).

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Court grant certiorari on the questions presented.

Respectfully submitted,

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